No. 137301

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

PATRICK LAWRENCE IDZIAK,

Defendant-Appellant

ON APPEAL FROM KENT COUNTY CIRCUIT COURT
Court of Appeals No. 285975
Kent County Circuit Court No. 07-000044-FC

CDAM'S AMICUS BRIEF SUPPORTING DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

QUESTIONS PRESENTED ii

INDEX OF AUTHORITIES iii

ACCEPTANCE OF JURISDICTIONAL STATEMENT AND STATEMENT OF FACTS 1

ARGUMENT:

I. **PATRICK LAWRENCE IDZIAK "SERVED TIME IN JAIL PRIOR TO SENTENCING" BECAUSE HE DID NOT POST THE $500,000 BOND IN THIS CASE. HE IS THEREFORE ENTITLED TO CREDIT UNDER MCL 769.11b EVEN THOUGH POSTING THE BOND MAY ONLY HAVE GIVEN MR. IDZIAK A TRIP TO PRISON.** 2

II. **THE DEPARTMENT OF CORRECTIONS ADHERENCE TO THE STATUTORY ADDITION OF THE MINIMUMS RULE IS CORRECT, LONG STANDING AND SHOULD NOT BE REVIEWED BY THIS COURT. MOREOVER, EVEN IF THE DEPARTMENT OF CORRECTIONS HAD SOME JURISDICTION/DISCRETION TO ADD ADDITIONAL TIME TO A PAROLE VIOLATOR, THE AGENCY IS NOT ABUSING ITS DISCRETION BY REFUSING TO EXERCISE THIS DISCRETION AS A MATTER OF POLICY.** 14

RELIEF 19

PROOF OF SERVICE 20

QUESTIONS PRESENTED

I. **DID PATRICK LAWRENCE IDZIAK "SERVED TIME IN *JAIL* PRIOR TO SENTENCING" WITHIN THE MEANING OF MCL 769.11b *BECAUSE* HE DID NOT POST THE $500,000 BOND IN THIS CASE?**

Amicus joins the Appellant in answering, "Yes."

II. **IS THE DEPARTMENT OF CORRECTIONS ADHERENCE TO THE STATUTORY ADDITION OF THE MINIMUMS RULE CORRECT?**

Amicus joins all parties in answering "Yes."

TABLE OF AUTHORITIES

Cases

Ansell v. Dep't of Commerce,
(On Remand), 222 Mich.App. 347 , 564 NW2d 519 (1997) 7

Cady v. Detroit,
289 Mich 499 , 286 N.W. 805 (1939) 6

Cardinal Mooney High School v MHSAA, 435 Mich 75, 80, 467 NW2d 21
(1991) 2, 14

Church of the Holy Trinity v. United States,
143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1892) 8

Dedes v Asch,
446 Mich 99 , 521 NW2d 488 (1994) 6

Detroit International Bridge Co v Commodities Export Co,
279 Mich App 662; 760 NW2d 565 (2008) 8

Engineering, Inc.,
418 Mich 520 , 345 NW2d 164 (1984) 7

Feazel v Department of Corrections,
31 Mich App 425; 188 NW2d 59 (1971) 12

Hinton v Parole Bd,
148 Mich App 235; 383 NW2d 626 (1986) 11, 17

In re Complaint of Rovas Against SBC Michigan,
482 Mich 90; 754 NW2d 259 (2008) 14

Luttrell v Department of Corrections,
421 Mich 93; 365 NW2d 74 (1984) 18

Michigan ex rel Muskegon County Prosecutor v Department of Corrections,
480 Mich 1072; 743 NW2d 916 (2008) 16

Motorola, Inc v Associated Indem Corp,
878 So 2d 824 (La Ct App 2004) 11

Nokia, Inc v Zurich American Ins Co,
202 SW3d 384 (Tex Ct App 2006) 11

People v Barbara,
400 Mich 352 ; 255 NW2d 171 (1977) 15

People v. Lively,
470 Mich 248 ; 680 NW2d 878 (2004) 16

People v McIntire,
232 Mich App 71 ; 591 NW2d 231 (1998) 7

People v McIntire,
461 Mich 147; 599 NW2d 102 (1999) 7, 8, 9

People v Monasterski,
105 Mich App 645; 307 NW2d 394 (1981) 9

People v. Parsons,
142 Mich.App. 751 ; 371 NW2d 440 (1985) 7

People v Stewart,
203 Mich App 432 ; 513 N.W.2d 147 (1994) 6

People v Whiteside,
437 Mich 188; 468 NW2d 504 (1991) 4

People v Wright,
128 Mich App 374; 340 NW2d 93 (1983) 4

SEC v. Chenery Corp.,
332 U.S. 194, 65 S Ct 1575 (1947) 18

Total Transp, Inc of Mississippi v Shores,
968 So 2d 456 (Miss Ct App 2006) 11

Wayne Co Pros v Dept of Corrections, 451 Mich 571, 548 NW2d 900 (1994) 15,16

Workman v. DAIIE,
404 Mich 477 , 274 NW2d 373 (1979) 7

Statutes

MCL 769.11b ..... i, ii

MCL 791.233e 17

MCL 791.234 14

MCL 791.234(2) 15

MCL 791.262 9

Agency Material

MDOC Policy Directive 06.05.100 17

Secondary Material

Maura D. Corrigan, Textualism in Action: Judicial Restraint on the Michigan Supreme Court, 8 Tex L & Politics 261 (2004) 5,8

Anton Scalia, A Matter of Interpretation: Federal Courts and the Law (New Jersey: Princeton University Press, 1997) 8

ACCEPTANCE OF JURISDICTIONAL STATEMENT AND STATEMENT OF FACTS

CDAM joins in the Appellant's Jurisdictional Statement and Statement of Facts.

ARGUMENT

I. PATRICK LAWRENCE IDZIAK "SERVED TIME IN *JAIL* PRIOR TO SENTENCING" *BECAUSE* HE DID NOT POST THE $500,000 BOND IN THIS CASE. HE IS THEREFORE ENTITLED TO CREDIT UNDER MCL 769.11b EVEN THOUGH POSTING THE BOND MAY ONLY HAVE GIVEN MR. IDZIAK A TRIP TO PRISON.

Standard of Review. CDAM is an agreement that the standard of review is *de novo. Cardinal Mooney High School v MHSAA,* 435 Mich 75, 80; 467 NW2d 21 (1991).

This Court has granted leave to decide whether a parolee who is detained in lieu of bond on a new offense may receive credit for time served under a statute that provides:

> Whenever any person is hereafter convicted of any crime within this state and has served any time *in jail* prior to sentencing *because of being denied or unable to furnish bond for the offense of which he is convicted,* the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

MCL 769.11b (emphasis added). CDAM believes the answer to the question is "yes."

Patrick Lawrence Idziak remained in the Kent County Jail because he was unable to post the $500,000 bond in his armed robbery case. There is nothing in the record that even remotely suggests that Mr. Idziak had these funds and chose not to post them. (Docket Entry No. 3 * Appellant's Appendix, 2a). In fact, Mr. Idziak has been found to be

indigent and is represented by the State Appellate Defender's Office, (Docket Entry No. 30 * Order Appointing Appellate Counsel).[1]

If Mr. Idziak had posted the bond, he would have become available to the Department of Corrections and they would have been forced to commence his formal parole revocation hearing within forty-five days of that date.[2] Until the inmate is actually returned to prison for a parole violation, it is speculation to presume that a revocation will actually take place. As the Court of Appeals has noted in another case:

> "Until revocation of parole, it is possible that a paroled prisoner who is being detained, for whatever reason or reasons, in a local facility will not be returned to state prison to finish out his or her original sentence. Paroled prisoners who are under accusation of violation of parole are entitled to parole revocation hearings within 45 days of their return to state prison or of their availability for return to prison. The hearing may take place at the prison or locally. M.C.L. § 791.240a(1); M.S.A. § 28.2310(1)(1). Such hearings are to be preceded by preliminary probable cause hearings or written notice of the charges and the evidence to be presented against the parolee at the fact-finding, parole revocation hearing. M.C.L. § 791.239a; M.S.A. § 28.2309(1). Only if a violation of parole is established by a preponderance of the evidence can parole be revoked. Even if a violation of parole is established, the parole board may decline to revoke parole. M.C.L. § 791.240a(6); M.S.A. § 28.2310(1)(6)."

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[1] It is unclear from the record whether Mr. Idziak's trial counsel was appointed or retained.

[2] *Hinton v Parole Bd*, 148 Mich App 235; 383 NW2d 626 (1986).

People v Wright, 128 Mich App 374, 378–79; 340 NW2d 93 (1983) (holding that an parole violator in the county jail with a new charge is not in state custody).

Whatever may have happened if Mr. Idziak managed to raise this large sum of money,[3] his failure to raise these funds rendered the point moot. His inability post the half-million bond is the reason he remained in jail.

This statute does not allow this Court to ignore its requirements simply because the alternative to the Kent County Jail might have been equally restrictive. Defendants who post bonds to serve strict home confinement scenarios or enter an inpatient drug treatment programs do not get credit for time served because they are not detained in a jail within the meaning of the statute.[4]

The series of Court of Appeals opinions denying bond have engrafted language into the statute which is not there. While nominally invoking the plain meaning doctrine, they have imputed their own personal morals and values into the statute thereby invoking two

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[3] CDAM is not suggesting that ability to raise the bond should be a guiding factor. The statute speaks of inability to post the bond. It does not suggest that failure to raise the bond money is the only or defining circumstance. CDAM is focusing on the $500,000 to suggest the absurdity of those who would treat the bond as a non-controlling circumstance.

[4] *Cf People v Whiteside*, 437 Mich 188; 468 NW2d 504 (1991) (denying credit for time served in drug treatment program).

discredited maxims – they have utilized the rejected common sense approach and absurd results approaches to statutory construction.[5]

SADO commendably attempts to interject a voice of clarity and reconcile the entire statutory scheme. The draftsmanship of some of the statutory provisions is poor and would benefit from a legislative rewrite, but the answer to today's question can be found in the simple text of the single statute. If Mr. Idziak was being detained in *jail* because he was

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[5] CDAM appreciates that irony of the statement. It is difficult to be opposed to "common sense" or in favor of "absurd results." The problem is that these terms cannot be defined and simply leave allow the writer to ignore the text of a statute and wax about why their proposed view of a statute has better public policy. As Justice Corrigan has noted:

> "A majority of our Michigan Supreme Court is committed to a textualist approach to judicial interpretation. In that regard, we are unique in the United States. For the past few years, our Court has been doing a good job of laying out sound principles of interpretation.
>
> "Textualism" is a reviled word in many circles. Some persons argue, and some of them occupy respected places in academia, that judges should employ a "dynamic" approach to interpretation, and thus play an active role in avoiding "absurd" results. Under such an approach, judges believe themselves empowered to look behind the words of the statute and divine the intentions of the Legislature."

Maura D. Corrigan, *Textualism In Action: Judicial Restraint On The Michigan Supreme Court*, 8 Tex Rev L & Politics 261, 261 (2004).

unable to post bond, he is entitled to mandatory credit for time served. If he was not, he is not entitled to credit under this statute.[6]

While the record is clear that Mr. Idziak is not receiving credit off his prior minimum service, this point is academic. There is no statutory mandate that credit for time served be coordinated like certain insurance benefits. This Court has repeatedly defended its textualist revolution on the grounds that it removes subjectivity and personal bias from the equation. Ignoring a statute because a Court believes that the results are "unjust,"[7] "belie common sense," or "inequitable" will reverse the Court's course and will result in the institutionalization of the old lawyer's joke – "bad facts make bad law."[8]

Many of the justices of this Court have publicly acknowledged their personal belief in law and order, but this Court has steadfastly eschewed attempts to engraft this moral judgment into statutes where the

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[6] For reasons pointed out by SADO, the Court might have authority to exercise its discretion and award credit for time served. Appellant's Brief on Appeal, Issue III.

[7] *See Cady v. Detroit,* 289 Mich. 499, 509, 286 N.W. 805 (1939) ("Courts cannot substitute their opinions for that of the legislative body on questions of policy"); People v McIntire, 461 Mich 147, 159; 599 NW2d 102 (1999) ("in our democracy, a legislature is free to make inefficacious or even unwise policy choices. The correction of these policy choices is not a judicial function as long as the legislative choices do not offend the constitution. Instead, the correction must be left to the people and the tools of democracy: the 'ballot box, initiative, referendum, or constitutional amendment") (paraphrasing *Dedes v Asch,* 446 Mich. 99, 123-124, 521 N.W.2d 488 (1994) (Riley, J., dissenting))."

[8] *Cf People v Stewart,* 203 Mich App 432, 433 ; 513 NW2d 147 (1994) (denying credit for time served because parolees "owe(s) a debt to society they have not yet fully paid").

Legislature did not include such provisions. In *People v McIntire*, 461 Mich 147; 599 NW2d 102 (1999), this Court refused to engraft the requirement that the Defendant testify "truthfully" into an immunity agreement that did not specifically call for the same. Mr. McIntire had received an immunity agreement from prosecution for his involvement in a 1982 murder.

The Court of Appeals reversed the trial court's ruling stating:

> "When the meaning of statutory language is questioned, a reasonable construction must be given by looking to the purpose subserved thereby, and the meaning must be derived from the statutory context within which the language is used.' People v. Parsons, 142 Mich.App. 751, 756, 371 NW2d 440 (1985) (citations omitted). 'Indeed, 'provisions of a statute must be construed in light of the other provisions of the statute, in such a manner as to carry out the apparent purpose of the Legislature.' Workman v. DAIIE, 404 Mich 477, 507, 274 NW2d 373 (1979).' Dagenhardt v. Special Machine & Engineering, Inc., 418 Mich 520, 529, 345 NW2d 164 (1984). This Court and the Supreme Court have refused to construe statutory language in an isolated or non-contextual manner, see id. at 529-530, 345 NW2d 164; Ansell v. Dep't of Commerce (On Remand), 222 Mich.App. 347, 357, 564 NW2d 519 (1997), especially where such construction would render 'any statutory language surplusage, nugatory, absurd, or illogical,' id. at 355, 564 NW2d 519"

People v McIntire, 232 Mich App 71, 85; 591 NW2d 231 (1998). Justice (then Judge) Young dissented.[9]

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[9] The Court of Appeals majority opinion was authored by Justice (then Judge) Markman.

This Court granted leave to appeal and reversed the Court of Appeals ruling Justice Young's dissent in the Court of Appeals. There, Justice Young took issue with the results oriented approach that the Court of Appeals majority applied. The majority relied on an extrinsic ambiguity (the unjust results of allowing a defendant to trade a murder conviction for perjured testimony) to create an ambiguity. The Court then used the absurd results rule to depart from the clear text of the rule. Such an approach was fundamentally flawed. "[We] agree with Justice Scalia's description of such attempts to divine unexpressed and non-textual legislative intent as 'nothing but an invitation to judicial lawmaking.' Scalia, *A Matter of Interpretation: Federal Courts and the Law* (New Jersey: Princeton University Press, 1997), p. 21. This non-textual approach to statutory construction has unfortunately led [the Court of Appeals majority] away from the task of determining the Legislature's expressed intent." *McIntire*, 461 Mich at 155.[10]

The *McIntire* Court expressly rejected the United States Supreme Court's ruling in *Church of the Holy Trinity v. United States*, 143 US 457, 12 S Ct 511, 36 L Ed 226 (1892) – the decision widely regarded as the seminal decision on the "absurd result" doctrine." *McIntire*, 461 Mich

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[10] One panel of the Court of Appeals has found that this Court has departed from this rationale. This Court has never stated this and it has rejected this approach as a whole. *Detroit International Bridge Co v Commodities Export Co*, 279 Mich App 662; 760 NW2d 565 (2008). That matter is presently pending before this Court.

147, 155 (Section II: "Sins of an Un-Holy Trinity: The So-Called "Absurd Result" Rule of Construction"). As Justice Corrigan explained this ruling:

> In People v. McIntire, we rejected the so-called "absurd result" rule of construction whereby a judge would disregard the plain meaning of a text if it created a result that the judge deems unjust or absurd. [Relying, in part, on A Matter of Interpretation, the McIntire Court opined that the "absurd result" rule inevitably invites judges to inject their own personal policy preferences.

Textualism In Action, 8 Tex R L & Policy at 264. This is precisely the approach that the Prosecutor and the Court of Appeals advocate.

A. "Jail."

The term jail as used in this statute means a place of pretrial confinement. Whatever else it may mean, it does not mean a prison. According to MCL 791.262:

> "Jail" means a facility that is operated by a local unit of government for the detention of persons charged with, or convicted of, criminal offenses or ordinance violations; persons found guilty of civil or criminal contempt; or a facility which houses prisoners pursuant to an agreement authorized under Act No. 164 of the Public Acts of 1861, being sections 802.1 to 802.21 of the Michigan Compiled Laws, for not more than 1 year."

A prison is not operated by local government, does not hold pretrial detainees, ordinance violators, or criminal contemptors. Individuals sentenced to prison have to have a sentence exceeding one year. *Cf People v Monasterski*, 105 Mich App 645; 307 NW2d 394 (1981) (a person

housed in a county jail awaiting trial is not "imprisoned" within the meaning of the Interstate Agreement on Detainers).

If Mr. Idziak miraculously raised the $500,000, he would have had the "privilege" of going to prison. The Department of Corrections would have been forced to either pick him up and proceed with a parole revocation or release him and reinstate him on parole pending the disposition of the armed robbery and felony-firearm case. While it is obvious that they would not have allowed Mr. Idziak to remain at liberty accused of a violent life felony; it is not as clear that they always refuse this opportunity to allow other offenders to remain at large.

Because the bond was never posted in this case, the agency was not required to make the decision. The issue of secondary reasons for Mr. Idziak's detention never came into play. The only reason Mr. Idziak was in the Kent County (or any other) jail was because he did not post the required bond.

B. "Because of."

The term "because of" means that a defendant as a direct result of the his/her inability to furnish bond. It does not mean that it must be the exclusive factor. Failure to post bond is the most direct factor holding a Defendant in jail. When a criminal defendant is arrested and given bond, which is why the particular sheriff is ordered to detain the individual. If the offender is unable to post the main bond, he or she may not take any steps to deal with other minor detainers or warrants

that may be outstanding. For example, an individual being detained on a life offense with a large cash bond, may not take steps to clear an outstanding traffic offense, even though the bond on that charge might be under $100. The presence of such a hold/detainer does not negate the fact that this hypothetical person remains in jail because he was unable to furnish the principal bond.

The term "because of" connotes proximate cause. *Motorola, Inc v Associated Indem Corp*, 878 So 2d 824, 835 n11 (La Ct App 2004) (en banc). "Because of" means "be by reason of or on account of." *Nokia, Inc v Zurich American Ins Co*, 202 SW3d 384 (Tex Ct App 2006). 'The words 'because of,' like other broadly-construed words of causation with the act, such as 'arising out of,' express the necessity of a nexus" *Total Transp, Inc of Mississippi v Shores*, 968 So 2d 456, 463 (Miss Ct App 2006). In this case there was a clear nexus between Mr. Idziak's failure to furnish the $500,000 and his presence in the Kent County Jail. This was the causal reason why he remained jailed.

If Mr. Idziak posted the bond and only if he posted the bond would he have become "available to" to the Michigan Parole Board. According to *Hinton v Parole Bd*, 148 Mich App 235; 383 NW2d 626 (1986), a person "is available to" the Board only when the person is being detained solely at the request of the Board. Similarly, the Court of Appeals noted in an earlier decision that a person who is detained on a criminal charge

in lieu of bond is *not* being detained by the Parole Board, but by the criminal court.

> Plaintiff was arrested and charged with possession of an uncased shotgun. Plaintiff does not question the legality of his confinement on the charge. Therefore, since he was not incarcerated 'under accusation of a violation of his parole' until the Department of Corrections had considered whether to recommend revocation of parole and the parole violation warrant had been issued, plaintiff was not 'returned to a state penal institution' until March 6, 1969. Therefore, since the hearing was originally scheduled for March 31, 1969, and the one adjournment was at the request of the plaintiff, the 30-day requirement of M.C.L.A. s 791.240a (Stat.Ann.1970 Cum.Supp. s 28.2310(1)) was met. Therefore, since plaintiff does not contend that the 25-day period between the date of his arrest and the issuance of the parole violation warrant was undue or unreasonable, we find plaintiff's first contention to be without merit."

Feazel v Department of Corrections, 31 Mich App 425, 428–29; 188 NW2d 59 (1971).

Had Mr. Idziak posted the bond, the forty-five day clock on Mr. Idziak's parole revocation would have started and the agency would have been required to decide whether to proceed or abandon the revocation. Until the bond the was posted, the agency proceedings were effectively halted.

The parole hold was not the causal reason why Mr. Idziak remained in jail. Mr. Idziak remained in the Kent County Jail "because

of" inability to post the $500,000 bond. The decisions denying bond in this circumstance are wrongly decided and should be rejected.

For these reasons, CDAM requests this Court declare that individuals such as Mr. Idziak are entitled to credit for time served in jail on their new charges.

II. THE DEPARTMENT OF CORRECTIONS ADHERENCE TO THE STATUTORY ADDITION OF THE MINIMUMS RULE IS CORRECT, LONG STANDING AND SHOULD NOT BE REVIEWED BY THIS COURT. MOREOVER, *EVEN IF* THE DEPARTMENT OF CORRECTIONS HAD SOME JURISDICTION/DISCRETION TO ADD ADDITIONAL TIME TO A PAROLE VIOLATOR, THE AGENCY IS NOT ABUSING ITS DISCRETION BY REFUSING TO EXERCISE THIS DISCRETION AS A MATTER OF POLICY.

Standard of Review. Questions of statutory construction are subject to de novo review. *Cardinal Mooney High School v MHSAA*, 435 Mich 75, 80; 467 NW2d 21 (1991). Notwithstanding this, where an agency is given the authority to implement the statute, Courts give some respect to the long standing agency interpretation of a statute is entitled to respectful consideration. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90; 754 NW2d 259 (2008).

This Court should not alter the Department of Correction's tradition (and statutorily authorized) method of computing consecutive sentences. The long standing agency interpretation of MCL 791.234 is both correct and reasonable. Moreover, *even if the agency had discretion* to modify a prisoner's original sentence as suggested in the leave grant order, the agency would not be abusing its discretion in refusing to do so as a matter of policy. By deferring this question to a point in time closer to an inmate's release decision, the agency decisionmaking would be enhanced. A parole violator with a new sentence will normally receive a significantly longer composite maximum sentence. The Parole Board will

thus have flexibility to decide whether an inmate has "turned the corner" and should be given an additional chance. Without adding any additional time to Mr. Idziak's minimum, he will have served more than a decade in prison and will be nearing his 70th birthday at the time that he can first be considered for release. If he is not ready to be released, the Board can hold Mr. Idziak an additional fifty years (e.g. well past the point that he possibly be alive).

First, the method of computing consecutive sentences is defined in MCL 791.234(2):

> If a prisoner is sentenced for consecutive terms, whether received at the same time or at any time during the life of the original sentence, the parole board shall have jurisdiction over the prisoner for purposes of parole when the prisoner has served the total time of the added minimum terms, less the good time credit allowed by statute. The maximum terms of the sentences shall be added to compute the new maximum term under this subsection . . .

See also Wayne Co Pros v Dept of Corrections, 451 Mich 571-572, 579-581; 548 NW2d 900 (1994). It appears that all parties agree that there is no statutory authority to add additional time to an inmate's first minimum sentence. *See* Appellant's Brief, p. 2-3; MDOC Brief, p. 5-11; Kent County's Brief, p. 18.

Second, while not binding on the Court, the general agreement of differing sides is a factor which this Court should consider in deciding this matter. As this Court noted in *People v Barbara*, 400 Mich 352, 376–77; 255 NW2d 171 (1977):

> "It is significant to note that only the defendant and the American Polygraph Association argued for admissibility. Even those who might be generally expected to be the first to advocate devices which would favor defendants, such as the State Appellate Defender Office (SADO) and the Michigan Association of Criminal Defense Lawyers, opposed admissibility. The prosecutors, as represented by the Oakland County Prosecutor in the case at bar, and the Prosecuting Attorneys Appellate Service, argued on the same side of the issue as SADO and the Criminal Defense Lawyers."

Third, the interpretation in question goes back to at least 1992. Wayne County, 451 Mich at 574.[11] The long standing agency interpretation should not be lightly interfered with. *Michigan ex rel Muskegon County Prosecutor v Department of Corrections*, 480 Mich 1072; 743 NW2d 916 (2008) (Markman, J. concurring) ("in light of the fact that the department's current policies and practices have been employed for more than a half century, and in light of the reliance interests that have arisen in connection with these policies and practices, I believe that further relief must come from the legislative or executive branches of government"). *See also People v. Lively*, 470 Mich 248, 259; 680 NW2d 878 (2004) (Markman, J., concurring).

The fact that the Department of Corrections may not add additional time to the inmate's sentence at the time of recommitment, does not mean that the violation and/or the new offense are not

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[11] The undersigned represented Mr. Young in that suit, but no longer possesses a copy of the file in that matter.

considered. A criminal defendant's history of parole failures is always considered at any new parole hearing. *See* MCL 791.233e (factors contained in Parole Guidelines); MDOC Policy Directive 06.05.100, p. 3 ("Prior Criminal Record Section"). Parole Failures are considered in Subsection 6. Subsection 7 requires the Board to consider whether the inmate was on parole or probation at the time of the current offense.

Consecutive sentences involve both the addition of the minimum and addition of the maximum. According to the Michigan Department of Corrections' OTIS tracking system,[12] the first date that Mr. Idziak can be theoretically released on parole is March 5, 2021. The last day that the MDOC can hold him is November 13, 2076. Assuming, Mr. Idziak receives the 96 days that are in dispute; the first date that the Department of Corrections can see him will be November 29, 2020. Using either first release date, Mr. Idziak will be nearly 70 years old at the time of his first possible release date. (His collective maximum sentence is beyond Mr. Idziak's life span). The fact that the Legislature has not chosen to "front load" any additional sanction for this serious parole violation does not mean that Mr. Idziak has received a "get out of jail free card." His history of reoffending and his performance in prison for the next decade will both be considered.

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[12] Offender Tracking Information System (OTIS) - Offender Profile, http://www.state.mi.us/mdoc/asp/otis2profile.asp?mdocNumber=124501 (last visited Apr. 3, 2009).

Fourth, assuming for the sake of argument that the Department of Corrections had any discretion to begin reviewing whether the Department should be adding time to parole violator's first sentence, the Department would not be abusing its discretion to decline to exercise that discretion as a matter of policy. According to this Court's decision in *Luttrell v Department of Corrections*, 421 Mich 93; 365 NW2d 74 (1984), an agency may exercise discretion through rules and policies as well as on an individual basis. *See also SEC v. Chenery Corp,* 332 US 194, 203, 65 S Ct 1575 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."). Assuming for the sake of argument that the Department had any discretion in this matter to lengthen a sentence, the Department would not have acted erroneously by making a policy decision not to use the same.

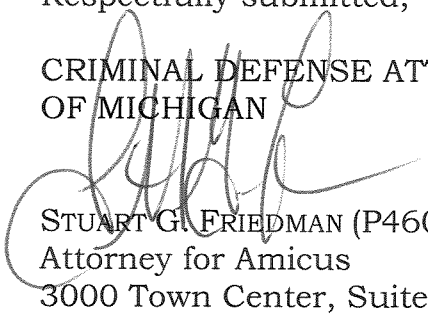
This Court should uphold the Department's method of sentence calculation.

RELIEF

WHEREFORE, Amicus asks this Court to find that Mr. Idziak may receive the jail credit on the present sentence. Questions about the Department of Correction's sentence computation policy should not be decided in this case.

Respectfully submitted,

CRIMINAL DEFENSE ATTORNEYS
OF MICHIGAN



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